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No. 99-1792

In the Supreme Court of the United States

DIRECTOR OF REVENUE OF MISSOURI, PETITIONER

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the State of Missouri, consistently with 12 U.S.C. 2134, may tax the income of the National Bank for Cooperatives, a federally chartered instrumentality.

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INTEREST OF THE UNITED STATES

This case concerns whether Congress has exempted from state taxation the income of a privately-owned, for-profit agricultural lending bank chartered as a federal instrumentality under the Farm Credit Act of 1971, 12 U.S.C. 2001 *et seq.*, as amended by the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678. The United States has a substantial interest in ensuring that statutorily defined federal instrumentalities are taxed by States solely in accordance with federal law. In response to this Court's invitation, the United States filed an amicus curiae brief at the petition stage (and subsequently on the merits as well) in

Arkansas v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), which presented an issue similar to the one here. The Court decided that case on procedural grounds, however, without reaching the merits.

STATEMENT

Respondent CoBank ACB is successor to all rights and obligations of the National Bank for Cooperatives. It seeks a refund of state income taxes paid to Missouri by the National Bank for Cooperatives for the years 1991 through 1994. Pet. App. A8-A9.

1. In the Farm Credit Act of 1933, ch. 98, 48 Stat. 257, Congress reformed the system of lending for farmers in a manner intended "to provide stimulus in the form of Government capital and supervision to the establishment of local institutions in which farmers are participants and owners and through which necessary credit may be provided on a safe business basis and at reasonable cost." H.R. Rep. No. 171, 73d Cong., 1st Sess. 2 (1933). The Act sought to accomplish that goal through the organization and chartering of different types of institutions that would meet the specific credit needs of farmers.

Under the overall supervision of the Farm Credit Administration, the system as enacted by Congress in 1933 organized the country geographically into 12 farm credit districts, with each district having a federal land bank, a number of federal land bank associations, a federal intermediate credit bank, a number of production credit associations, and a bank for cooperatives. Within the district, each institution had a discrete lending purpose: the federal land bank to make long-term first loans secured by mortgages on farm land to farmers through land bank associations; production

credit associations to make short- and intermediate-term loans to farmers and ranchers with capital obtained by discounting loans with the federal intermediate credit bank; and the bank for cooperatives to make loans to cooperative associations that are engaged in marketing farm products, purchasing farm supplies, or furnishing farm-business services. See generally H.R. Rep. No. 593, 92d Sess., 1st Sess. 6-9 (1971) (describing institutions in the Farm Credit System). By statute, each of those institutions is defined as an "instrumentality of the United States." See 12 U.S.C. 2121 note (national bank for cooperatives); 12 U.S.C. 2121 (banks for cooperatives); 12 U.S.C. 2071(a) and (b)(7) (production credit associations); 12 U.S.C. 2011(a) (farm credit banks); 12 U.S.C. 2091(a) and (b)(4) (federal land bank associations).

The Farm Credit Act of 1933 also established a Central Bank for Cooperatives in addition to the bank for cooperatives in each of the 12 farm credit districts. Ch. 98, §§ 2, 30, 40, 48 Stat. 257, 261, 264. Congress intended for the Central Bank for Cooperatives to make loans to cooperative associations. See § 34, 48 Stat. 262-263; 12 U.S.C. 2122, 2124, 2128, 2129. The debentures issued by the Central Bank, however, "are not guaranteed in any way by the United States." H.R. Rep. No. 593, *supra*, at 9. Rather, Congress intended the loan funds of the banks to be obtained from the capital and surplus of the banks, as well as from the sale of debentures to the investing public. *Ibid.*

Although Congress initially capitalized the banks for cooperatives (and other institutions in the Farm Credit System), see Farm Credit Act of 1933, ch. 98, §§ 33, 40, 48 Stat. 262, 264, it provided for the governmental stake in those institutions to be retired "by the creation of permanent capital provided by the users of the bank."

H.R. Rep. No. 593, *supra*, at 9. See Farm Credit Act of 1955, ch. 785, 69 Stat. 655 (providing mechanisms to facilitate retirement of government stock ownership in banks for cooperatives). "The first of the banks for cooperatives to retire all of its Government capital did so in 1965 and the last in 1968. Therefore all Government capital has now been retired, and the banks are completely owned by borrowing cooperatives." H.R. Rep. No. 593, *supra*, at 9.

In 1987, Congress authorized the merger of the Central Bank and the district banks for cooperatives. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 413(b)(4), 101 Stat. 1639 (12 U.S.C. 2121 note). Pursuant to that legislation, ten district banks and the Central Bank for Cooperatives merged and formed the National Bank for Cooperatives. J.A. A22-A23; Pet. App. A8-A9.[1] The taxation provisions relevant to this case, however, concern banks for cooperatives, for the 1987 Act authorizing consolidation of such banks with the Central Bank for Cooperatives did not affect the taxation of those institutions. See Farm Credit Act of 1933, ch. 98, §§ 33, 40, 48 Stat. 262, 264; 12 U.S.C. 2134.

2. In the Farm Credit Act of 1933, Congress specifically provided that the Central Bank for Cooperatives and banks for cooperatives "shall be deemed to be instrumentalities of the United States" and that "all

[1] Respondent CoBank ACB is an agricultural credit bank that was created when the National Bank for Cooperatives merged with two other entities, the Farm Credit Bank of Springfield and the Springfield Bank for Cooperatives. J.A. A21-A22. Although an "agricultural credit bank" is not defined by federal statute, the Farm Credit Administration has recognized such institutions as having the combined authority of a bank for cooperatives and a farm credit bank. See Farm Credit Admin., *1994 Annual Report* 2.

notes, debentures, bonds and other such obligations issued by such banks * * * shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority." Ch. 98, § 63, 48 Stat. 267. That Section further provided that the income of those banks "shall be exempt from all taxation" by taxing authorities "except that any real property and any tangible personal property of such banks * * * shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed." *Ibid.* Notwithstanding that broad exemption, the 1933 Act provided a limitation: "The exemption provided herein shall not apply with respect to * * * the Central Bank for Cooperatives, or any Production Credit Corporation or Bank for Cooperatives, or its property or income after the stock held in it by the United States has been retired." *Ibid.*

By 1971, when Congress amended the Farm Credit Act, all previously-organized banks for cooperatives had become privately owned, because the stock once held in them by the United States had been retired. See H.R. Rep. No. 593, *supra*, at 9. Congress provided, however, that the Governor of the Farm Credit Administration had the authority on behalf of the United States to purchase stock in banks for cooperatives "as a temporary investment in the stock of the institution to help one or several of the banks or associations to meet emergency credit needs of borrowers." Pub. L. No. 92-181, § 4.0, 85 Stat. 609. To assist in aiding agricultural lending entities during financial emergencies, Congress empowered the Governor of the Farm Credit Administration to purchase stock in the various institutions es-

tablished within the Farm Credit System, including banks for cooperatives. § 4.0, 85 Stat. 609. Furthermore, Congress retained the exemption from taxation for each bank for cooperatives that had existed prior to 1971—an exemption contingent on ownership of stock in the bank by the United States (through the Farm Credit Administration). § 3.13, 85 Stat. 608-609 (codified at 12 U.S.C. 2134). The amended statute provided:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority. *Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed. The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.*

Ibid. (emphasis added).

By 1985, a poor agricultural economy had driven the Farm Credit System into a financial crisis. See H.R. Rep. No. 425, 99th Cong., 1st Sess. 6-11 (1985). Congress considered various options, including an infusion of federal funds into the Farm Credit System, but rejected that idea in part because of its conclusion that "if the System uses its own resources effectively, outside assistance is not now needed and not likely to be needed through 1987." *Id.* at 14. Instead, Congress enacted the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, 99 Stat. 1678, to permit the Farm Credit System to use its own resources in addressing the financial needs of members. See H.R. Rep. No. 425, *supra*, at 11, 14. Among other things, the 1985 Act restructured the Farm Credit Administration so that it would be controlled by a three-member board instead of by a Governor, § 201(1), 99 Stat. 1688, and modified the role of the Farm Credit Administration within the Farm Credit System, § 201(7), 99 Stat. 1691. Congress discontinued the Farm Credit Administration's authority to own stock in a bank for cooperatives as part of an effort to "establish the Farm Credit Administration as an arms length regulator of the System institutions and to take it out of certain activities of the System which would involve it in management discretion of such institutions." H.R. Rep. No. 425, *supra*, at 28. See Pub. L. No. 99-205, §§ 101, 201(7), 99 Stat. 1678, 1691-1693; see also H.R. Rep. No. 425, *supra*, at 15 (explaining that Section 101 of the Act "would repeal and replace sections 4.0 and 4.1 of the Act, which establish two revolving funds that are available to the Governor of the Farm Credit Administration to make investments in

production credit associations, Federal intermediate credit banks, and banks for cooperatives").[2]

In addition to changes in "the basic powers, duties and authorities of the Farm Credit Administration," the Act also contained "numerous technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28; see § 205, 99 Stat. 1703-1707. Among those technical amendments was the deletion of the two sentences within Section 3.13 of the 1971 Act italicized above, which exempted a bank for cooperatives from state taxation contingent upon stock ownership by the "Governor of the Farm Credit Administration." § 205(e)(10), 99 Stat. 1705.[3] The 1985 Act left Section 3.13, now codified at 12 U.S.C. 2134, much as it currently exists (set forth at Pet. 2).[4]

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[2] Although the Farm Credit Administration was no longer authorized to provide any separate capital assistance directly to institutions such as banks for cooperatives, it could make investments from the United States' "revolving fund" in the newly created Farm Credit System Capital Corporation. § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. The Capital Corporation became solely responsible for providing financial and technical assistance to institutions experiencing difficulties, with its funds being raised mostly internally from other institutions in the Farm Credit System. § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. The Farm Credit System Assistance Board and the Farm Credit System Financial Assistance Corporation have since replaced the Farm Credit System Capital Corporation. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 201, 101 Stat. 1585-1605.

[3] Pub. L. No. 99-205 contains two separate sections designated as 205(e). The first Section 205(e) deals with production credit associations and the second deals with banks for cooperatives.

[4] In the Agricultural Credit Act of 1987, Congress amended 12 U.S.C. 2134 to add a second exception to the tax exemption, inserting after the word "authority," the clause "except that interest on

3. Respondent's predecessor, the National Bank for Cooperatives, filed Missouri corporate income tax returns and paid Missouri income tax for tax years 1991 through 1994. In March 1996, respondent filed amended returns on behalf of the National Bank for Cooperatives, seeking refunds of income tax paid for 1991 through 1994 on the ground, *inter alia*, that the National Bank for Cooperatives was exempt from state income taxation because it was a federal instrumentality and Congress had not expressly consented to its being subject to state taxation in the amended version of the Farm Credit Act (12 U.S.C. 2134). The Missouri Director of Revenue denied respondent's claims in pertinent part. J.A. A14-A20, A29-A34. Respondent challenged that decision before Missouri's Administrative Hearing Commission, which upheld the director's denial. Pet. App. A6-A16. The commission held that the National Bank for Cooperatives had not established that it was a federal instrumentality statutorily exempt from state taxation of its income. The commission determined that, in contrast to farm credit banks and federal land bank associations, Congress did not expressly provide that banks for cooperatives would have immunity from state income taxation. *Id.* at A14. The commission found that had Congress intended to confer upon banks for cooperatives the same immunity that was provided to farm credit banks and federal land bank associations, it would have done so expressly. *Ibid.* For jurisdictional reasons, the commission did not reach respondent's constitutional claim. *Id.* at A2, A11.

4. The Missouri Supreme Court upheld respondent's constitutional challenge to the tax. That court inter-

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such obligations shall be subject to Federal income taxation in the hands of the holder." Pub. L. No. 100-233, § 805(p), 101 Stat. 1716.

preted this Court's Supremacy Clause jurisprudence to accord federal instrumentalities immunity from state income taxation and to require that such immunity could be waived only by express statutory consent. Pet. App. A2-A3. The court reasoned that Congress had consented to state income taxation of banks for cooperatives under Section 3.13 of the Farm Credit Act of 1971 (former 12 U.S.C. 2134 (1976)) after the United States no longer owned stock in those banks, but that the 1985 amendments to the 1978 Act deleted that consent. Pet. App. A3. The court further opined that Congress's consent to taxation is at most implied and thus is insufficient to constitute a waiver. *Ibid.* The Missouri Supreme Court noted that other courts that have addressed the question under the Farm Credit Act, which has virtually identical language for production credit associations, had reached the same conclusion that States could not tax the income of those Farm Credit System institutions. *Ibid.* (citing *Farm Credit Servs. of Cent. Ark.* v. *Arkansas*, 76 F.3d 961, 964 (8th Cir. 1996), rev'd on other grounds, 520 U.S. 821 (1997); *State* v. *Farm Credit Servs. of Cent. Ark.*, 994 S.W.2d 453, 456 (Ark. 1999), cert. denied, 120 S. Ct. 1530 (2000); *Farm Credit Servs. of Mid-Am.* v. *Department of State Revenue*, 705 N.E.2d 1089, 1092 (Ind. Tax Ct. 1999); *Northwest La. Prod. Credit Ass'n* v. *State*, 746 So. 2d 280 (La. Ct. App. 1999)).

The New Mexico Court of Appeals reached the opposite conclusion with respect to income taxation of production credit associations under 12 U.S.C. 2077. See *Production Credit Ass'n of Eastern N.M.* v. *Taxation & Revenue Dep't*, 999 P.2d 1031 (Ct. App.), cert. denied, 997 P.2d 820 (N.M. 2000), reprinted in Pet. App. A17-A32. That court held that, under the language and history of 12 U.S.C. 2077, Congress had consented to

state taxation of the income of production credit associations. Pet. App. A30-A32. The court reasoned that, under the 1933 and 1971 Acts, production credit associations were exempt from state income tax only for so long as the United States owned stock in those associations. The court further concluded that the repeal in 1985 of the two sentences in 12 U.S.C. 2077 (1982) conditionally exempting the production credit associations from state income tax so long as the United States owned an equity interest in the associations did not change the law, but merely reflected the fact that the sentences had become redundant because the United States no longer held or would hold shares of stock in those associations. Pet. App. A28.

SUMMARY OF ARGUMENT

The decision below erroneously construed the Farm Credit Act of 1971, 12 U.S.C. 2134, to exempt banks for cooperatives from state income taxes. The Farm Credit Act of 1933 conferred on banks for cooperatives a broad exemption from such state taxation, but only for so long as the federal government maintained stock holdings in them. Since 1968, the federal government has not held any stock in a bank for cooperatives. Since that time, therefore, such banks have enjoyed a limited express exemption from state taxation with respect to their obligations, but the banks themselves have been liable for income taxation such as the State seeks to impose here.

In 1985, Congress enacted technical amendments that deleted the broader exemption from tax that had applied when the United States owned stock in banks for cooperatives. In ruling that Congress evinced no intent to continue to subject banks for cooperatives to state income taxation, the state supreme court in effect

interpreted the 1985 technical amendments as if Congress had deleted the condition precedent to the broad exemption—the federal government's stock ownership—but had not deleted the exemption itself. Neither the language of the amendment nor the history of Section 2134 supports that result.

ARGUMENT

STATE TAXATION OF THE INCOME OF BANKS FOR COOPERATIVES IS PERMISSIBLE UNDER THE FARM CREDIT ACT

As this Court has made clear, while "absent express congressional authorization[ ] a State cannot tax the United States directly," *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989) (citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)), Congress determines whether, and to what extent, instrumentalities performing federal functions are exempt from state and local taxation. *United States* v. *New Mexico*, 455 U.S. 720, 733-735, 737-738, 743-744 (1982); *Department of Employment* v. *United States*, 385 U.S. 355, 358 (1966). The language, structure, and history of the Farm Credit Act make clear that Congress intended for privately-owned, for-profit banks for cooperatives to be subject to the income tax Missouri seeks to impose.

A. By Its Plain Terms, Section 2134 Confers Only A Narrowly Defined Tax Exemption Inapplicable Here Rather Than A Broad Exemption From State Income Taxes For Banks For Cooperatives

1. Since the original enactment of the Farm Credit Act in 1933, Congress has declared that all banks for cooperatives are federal instrumentalities—regardless of whether the federal government owns any stock in them—and that, as such, their "notes, debentures,

bonds, and other such obligations * * * shall be exempt both as to principal and interest from all taxation" except for "surtaxes, estate, inheritance, and gift taxes." Ch. 98, § 63, 48 Stat. 267. If the federal government held an ownership interest in a bank for cooperatives, a broader exemption from state and federal taxes applied. *Ibid.*; see § 3.13, 85 Stat. 608-609. By 1968, however, the provision conferring the broader exemption from state taxation no longer had any practical effect, because the federal government no longer held any stock interest in any bank for cooperatives. See H.R. Rep. No. 425, *supra*, at 117 (noting that "the Banks for Cooperatives [were] farmer-owned by 1968"). The condition for exempting banks for cooperatives from state income tax had therefore ceased to exist.

In 1985, Congress restructured the Farm Credit System and withdrew the federal government's authority to own stock directly in banks for cooperatives. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. As part of that effort to make the System more self-sufficient, Congress created the Farm Credit System Capital Corporation to provide emergency investments in System entities with capital raised from within the System. Pub. L. No. 99-205, § 103, 99 Stat. 1680-1687; H.R. Rep. No. 425, *supra*, at 13-15. For the future, any federal government financial support was limited to investments in the Capital Corporation. Pub. L. No. 99-205, § 101, 99 Stat. 1678; H.R. Rep. No. 425, *supra*, at 28-29. In accordance with that restructuring, Congress also passed various technical amendments to 12 U.S.C. 2134. Those amendments deleted the reference to the federal government's stock ownership in a bank for cooperatives and the part of Section 2134 that authorized the broader exemption from federal and state taxation when the federal gov-

ernment owned stock in a bank for cooperatives. As amended, Section 2134 thus provides that notes, debentures, and other obligations issued by a bank for cooperatives are tax exempt while providing that interest on such obligations is subject to federal income tax. 12 U.S.C. 2134. As to any other tax obligations, the statute is now silent.

Respondent argues that the 1985 technical amendments rendered them exempt from state income taxes because the absence of any statement about tax liability is tantamount to a congressional intent that banks for cooperatives be completely exempt from such taxes. Such an interpretation, however, would render meaningless the provisions in Section 2134 specifically setting out tax exemptions for obligations of banks for cooperatives. Congress would not have needed to enact specific exemptions from state taxation if it had intended a rule of general exemption to apply. Rather than read the specific tax exemptions for banks for cooperatives as surplusage, the language in the statute should be given its full effect. See *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 347 (1998) ("[T]he Court avoids interpreting statutes in a way that 'renders some words altogether redundant.'") (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995)); *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("legislative enactments should not be construed to render their provisions mere surplusage").[5] From its inception in 1933 to the present,

[5] Indeed, under respondent's theory, it would be free from all state taxation, including property taxes. Such a result, however, would provide banks for cooperatives with an even broader exemption than originally enacted in 1933 by Congress, when the United States held stock in such banks, for even in that circumstance the banks were subject to property taxes. See Farm Credit Act of 1933, ch. 98, § 63, 48 Stat. 267; Pub. L. No. 92-181, § 3.13, 85 Stat. 608-609. Moreover, exempting banks for cooperatives from property tax would be inconsistent with Congress's treatment of property taxes for other institutions within the Farm Credit System. See 12 U.S.C. 2278a-11 (making Assistance Board subject to real estate taxes); 12 U.S.C. 2278b-10 (same for Financial Assistance Corporation); 12 U.S.C. 2098 (same for land bank associations).

therefore, nothing in the language of Section 2134 or its precursors supports the contention that Congress intended to create an exemption from income taxes for privately-owned banks for cooperatives.

2. Nor does anything in the legislative history of Section 2134 suggest such an intent. Because the statutory language prior to 1985 was unequivocal on this point, the state supreme court's conclusion must rest on Congress's intent in enacting the 1985 amendments. Yet nothing in the legislative history of those amendments suggests that Congress intended to grant to banks for cooperatives any expanded or new immunities from taxation. Indeed, in removing prior provisions authorizing the federal government to maintain direct stock holdings in the banks for cooperatives, as well as the original provisions conferring the broader exemption from state tax when the United States holds an ownership interest in the banks for cooperatives, the legislative history specifies that Congress intended to make only "technical and conforming amendments." H.R. Rep. No. 425, *supra*, at 28. If Congress had intended to alter the status quo in the 1985 amendments and to create a broad immunity from taxation for privately-owned banks for cooperatives, it is unlikely to have done so by a "technical amendment." See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979) ("[S]ilence [in legislative

history] * * * while contemplating an important and controversial change in existing law is unlikely."). Yet the decision below in effect assumes the exact opposite: even though Congress had explicitly created an exemption from taxation only in certain specifically defined contexts, the court nonetheless held that Congress impliedly intended to establish a much broader exemption. See Pet. App. A3.

The court's assumption is particularly implausible in view of the history of Section 2134. Congress was well aware that banks for cooperatives are for-profit entities chartered by the federal government. Consequently, Congress intended in the 1985 amendments for the federal government not to subsidize the banks for cooperatives, but rather to give the Farm Credit System the tools with which to use existing capital in the System to aid those with special financial needs. See H.R. Rep. No. 425, *supra*, at 7-8, 11-12. The history behind Section 2134, therefore, does not support the state supreme court's holding that Congress implicitly conferred upon banks for cooperatives a new, broad-based exemption from federal, state, and local taxes.

B. The Overall Context And History Of The Farm Credit Act Also Negate The Claim Of Immunity In This Case

From the original enactment of the Farm Credit Act, Congress explicitly determined which federally chartered lending institutions within the Farm Credit System would be entitled to comprehensive immunity from taxation and which would not. In addition to banks for cooperatives, the Farm Credit System includes farm credit banks, federal land bank associations, and production credit associations. 12 U.S.C. 2002(a). With respect to each entity, the Farm Credit Act contains a "taxation" provision that delineates specifically the immunity from taxes enjoyed by that entity. See 12 U.S.C. 2023 (farm credit banks), 2077 (production credit associations), 2098 (federal land bank associations), 2134 (banks for cooperatives).

For farm credit banks and federal land bank associations, Congress explicitly provided the type of comprehensive immunity that the state supreme court held to be implied here for banks for cooperatives. For example, Congress explicitly granted comprehensive immunity to farm credit banks under 12 U.S.C. 2023, which provides:

> The Farm Credit Banks and the capital, reserves, and surplus thereof, and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes on real estate held by a Farm Credit Bank to the same extent, according to its value, as other similar property held by other persons is taxed.

The substantive language of that exemption is identical to the language for federal land bank associations in 12 U.S.C. 2098. As to both entities, the exemption language has been largely unchanged since the Farm Credit Act of 1971. See Pub. L. No. 92-181, §§ 1.21, 2.8, 85 Stat. 590, 597.[6]

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[6] Section 1.21 of the Farm Credit Act of 1971 addressed the taxation of both federal land banks and federal land bank associations. Section 2.8 referred to the taxation of federal intermediate credit banks. Federal land banks and federal intermediate credit banks were merged and became "farm credit banks" under the Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 410, 101 Stat. 1637. As part of the 1987 Act, the taxation statutes were redesignated as Sections 1.15 and 2.17 for farm credit banks and federal land bank associations, respectively. Pub. L. No. 100-233, § 401, 101 Stat. 1629, 1637.

By contrast, production credit associations and banks for cooperatives have been granted only the limited exemption from taxation with respect to their obligations. See 12 U.S.C. 2077, 2134. Prior to the 1985 amendments to the Farm Credit Act, production credit associations (like banks for cooperatives) also possessed a broad-based exemption from taxation that was contingent upon the United States' stock ownership. See Pub. L. No. 92-181, § 2.17, 85 Stat. 602. That contingent exemption was repealed in 1985 by the same technical amendments that applied to the banks for cooperatives. See Pub. L. No. 99-205, § 205(e)(16), 99 Stat. 1705. Congress thus "intentionally and purposely" chose to grant an expansive immunity from taxation to farm credit banks and federal land bank associations, while at the same time conferring a more limited exemption (concerning only their notes, debentures, and other obligations) with respect to production credit associations and banks for cooperatives. Had Congress wished to confer upon banks for cooperatives and production credit associations the more comprehensive exemption from taxation that it had provided to federal credit banks and federal land bank associations, it presumably would have done so expressly as it had elsewhere in the Farm Credit Act. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Congress, however, did not "write the

statute that way." *Id.* at 23 (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).[7]

The effect of the state supreme court's decision is to grant to respondents a tax exemption equal to or potentially greater than that which Congress explicitly provided to farm credit banks and federal land bank associations, since the logic of the court's decision would arguably grant banks for cooperatives an exemption from real property taxes, an exemption not shared by either farm credit banks or federal land bank associations. See *Farm Credit Servs. of Cent. Ark.* v. *Arkansas*, 76 F.3d 961, 967 (8th Cir. 1996) (Loken, J., dissenting), rev'd on other grounds, 520 U.S. 821 (1997). That result would alter significantly the extent to which States and localities have been empowered to tax banks for cooperatives since at least 1968—an empowerment that has resulted in millions of dollars in tax revenues. See Ohio et al. Amici Cert. Br. 8. Nothing in Section 2134, the Farm Credit Act as a whole, or the pertinent legislative history indicates that Congress

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[7] Congress also has demonstrated its ability to provide federal instrumentalities with broad exemptions from state taxation outside of the Farm Credit Act. For example, in the Federal Credit Union Act, Pub. L. No. 86-354, 73 Stat. 628 (12 U.S.C. 1751 *et seq.*), federal credit unions, their property, their funds, and their income are exempt from all federal, state or local taxation, except that, like farm credit banks, their real and personal property are subject to taxation "to the same extent as other similar property is taxed." 12 U.S.C. 1768. Federal reserve banks have been granted similarly expansive tax exemptions as well. 12 U.S.C. 531. Those statutes further point up the contextual incongruity in the state supreme court's holding here and in respondents' arguments in support of it—namely, that Congress *sub silentio* granted banks for cooperatives a comprehensive exemption from all federal, state, and local taxation.

meant for its 1985 "technical" amendments to effect such a sweeping change.

C. The Court Need Not Decide In This Case The Scope Of A Federal Instrumentality's Exemption From State Taxes In Other Contexts

The theory advanced by respondent, and accepted by the court below, is that Congress's use of the term "instrumentalit[y] of the United States" in 12 U.S.C. 2134, coupled with the deletion in 1985 of the provision conferring an exemption from tax when the United States held shares in banks for cooperatives, is sufficient to warrant application of a broad constitutional rule that a federal instrumentality may not be taxed absent express consent by Congress. See Pet. App. A2-A3 (citing *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436-437 (1819)).

Respondent's position would require this Court to define what qualities of a federal instrumentality are sufficient to warrant recognition of such a broad-based immunity from state taxation. Yet, as this Court has noted, "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." *Department of Employment* v. *United States*, 385 U.S. 355, 358-359 (1966). Unlike the Red Cross in that case, for instance, the banks for cooperatives do not have officers "appointed by the President," "the right and the obligation to meet this Nation's commitments under various [statutes], [or the authority] to perform a wide variety of functions indispensable to the workings of our [government]." *Id.* at 359. The banks for cooperatives do not "receive substantial material assistance from the Federal Government" nor have "the President and the Congress * * * recognized and acted in

reliance upon the [banks for cooperatives'] status virtually as an arm of the Government." *Id.* at 359-360. While *Department of Employment* noted that the foregoing qualities were not exhaustive, the Court elsewhere has expressed reluctance to announce a constitutional rule in contexts in which Congress has manifested its intent through statutory law. See, *e.g.*, *First Agric. Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 341 (1968) ("Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.").

That doctrine of prudence is especially appropriate in this area of the law. Congress has used the term "instrumentality" in literally scores of enactments, some with express tax exemption provisions and some without.[8] Congress also has established or chartered by statute "government corporations" and "government controlled corporations," which perform important functions and for which exemptions from certain forms of taxation may or may not be conferred by statute.[9] Because a ruling in favor of respondent could

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[8] See, *e.g.*, 12 U.S.C. 2283, 2290 (Federal Financing Bank an "instrumentality of the United States" with specified exemptions from tax); 15 U.S.C. 713a-5, 714 (same for Commodity Credit Corporation); see also 42 U.S.C. 2297h-3 (Supp. III 1997) (provisions for United States Enrichment Corporation to be "instrumentality" with certain exemptions from taxation prior to its privatization).

[9] See, *e.g.*, 12 U.S.C. 1430, 1433 (Federal Home Loan Banks with specified exemptions from taxation); 12 U.S.C. 1451, 1452 (same for Federal Home Loan Mortgage Corporation); 12 U.S.C. 1717 (1994 & Supp. IV 1998), 12 U.S.C. 1723 (same for Government National Mortgage Association and Federal National Mortgage

bear on how the taxation of those entities is treated, conferral of any broad exemption from taxation for banks for cooperatives properly should be prescribed by Congress, if it regards such a policy to be in the national interest. See, *e.g.*, *First Agric. Nat'l Bank*, 392 U.S. at 346 ("Because of [the statute] and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from Congress, which has established the present limits.").

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted.

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